

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

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COMPLETE TITLE OF CASE:

TOM'S AGSPRAY, LLC.

Respondent

v.

KERRY COLE

Appellant

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DOCKET NUMBER **WD71477**

April 13, 2010

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Appeal From:

Circuit Court of Mercer County, MO  
The Honorable James Bradley Funk, Judge

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Appellate Judges:

Division Four: Thomas H. Newton, C.J., Karen K. Mitchell, and Cynthia L. Martin, JJ.

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Attorneys:

John L. Young, Princeton, MO

Counsel for Appellant

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Attorneys:

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Counsel for Respondent

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**MISSOURI APPELLATE COURT OPINION SUMMARY**  
**MISSOURI COURT OF APPEALS, WESTERN DISTRICT**

TOM'S AGSPRAY, LLC., Respondent, v.  
KERRY COLE, Appellant

WD71477

Mercer County

Before Division Four Judges: Thomas H. Newton, C.J., Karen K. Mitchell and Cynthia L. Martin, JJ.

Tom's Agspray, LLC. sued Kerry Cole after he refused to pay Agspray for all of its expenses in seeding Cole's land. Cole admitted that he owed the application fee (\$6.00 per acre) for the seeding but denied owing for the cost of a fertilizer. Cole counterclaimed for damages to his land caused by Agspray's negligent use of a fertilizer containing nitrogen. The trial court determined that Cole understood that the seeding application fee was charged per acre and that a carrier(fertilizer) was needed to spread the seed, but he thought the carrier would be inert and would cost little or nothing. It determined that Cole must solely bear the adverse consequences of spreading fertilizer to the land and denied the counterclaim. Cole appeals the trial court's judgment awarding Agspray \$5,457.99 for unpaid services and denying Cole's counterclaim for damages.

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

**Division Four holds:**

Cole argues that the trial court erred in awarding \$5,457.99 to Agspray because there was no evidence to support a finding that the parties agreed to the materials used to spread the seeds or the charge for spreading them, nor to support or a finding that the charges were reasonable. To prevail in a suit on account, the plaintiff has to show offer, acceptance, payment, correctness of the account, and the reasonableness of the charges. The trial court determined that the parties agreed to the materials used and the price charged. Although the evidence was in conflict as to the terms of the contract, the trial court had the prerogative to believe Agspray's evidence rather than Cole's, and we must defer to its determination. Because the evidence supports the trial court's finding of terms, it did not err. However, the evidence does not support the reasonableness of the charges. Thus, the trial court erred in finding that the charges were reasonable.

Cole also argues that the trial court erred in denying his counterclaim because Agspray owed a duty to him, breached the duty when it used a fertilizer containing nitrogen, and the use of nitrogen caused damage to the land. To prevail on a negligence claim, a party has to show duty, a breach of that duty, a proximate cause between the conduct and the resulting injury, and actual damages suffered. The trial court determined that Cole had to bear the risk of its damages and denied his counterclaim. Although the trial court did not specify which elements Cole failed to satisfy, we must consider facts as having been found in accordance with the results reached. Whether any alleged breach of a duty caused damages is a question of fact. Because the trial court denied the negligence claim, we must determine that it found against causation. Because the evidence supports a finding against causation, the trial court did not err in denying the counterclaim.

Therefore, we affirm the trial court's ruling that there was an agreement for services and goods. We also affirm the denial of the counterclaim. However, we reverse the award of damages and remand the case to the trial court.

**Opinion by: Thomas H. Newton, Judge**

April 13, 2010

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